

DICK L. POFF

VS.

Respondent
Self-Insured

AND

KANSAS WORKERS COMPENSATION FUND

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as if specifically set forth in the Award of the Special Administrative Law Judge dated October 11, 1994.

ISSUES

The sole issue presented by oral argument for decision by the Appeals Board is:

- (1) Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) In addition to the admitted injury to the right shoulder, the Appeals Board finds that the claimant, Dick L. Poff, suffered injury to his left shoulder arising out of and in the course of his employment. The claimant's testimony that he reported the problems with his left shoulder to the foreman and company nurse is uncontroverted. Uncontroverted evidence that is neither improbable nor unreasonable cannot be disregarded by the trial court, and such uncontroverted evidence should ordinarily be regarded as conclusive, unless it is shown to be untrustworthy. D. M. Ward Constr. Co. v. Electric Corp. of Kansas City, 15 Kan. App. 2d 114, 803 P.2d 593, rev. denied 248 Kan. 994 (1991). Based on the bilateral shoulder injuries, the claimant is entitled to a twenty-nine percent (29%) permanent partial general disability on the basis of work disability.

The parties stipulated that the claimant met with personal injury to his right shoulder that arose out of and in the course of his employment with the respondent. Claimant alleges that he received injuries to both the right shoulder as well as the left shoulder as a direct result of the injury. Respondent contends that the claimant only injured his right shoulder.

The claimant was treated by Dr. Montgomery who performed surgery on the right shoulder after a trial of conservative care. Dr. Montgomery issued an impairment rating of five percent (5%) of the right upper extremity based on a final exam conducted four (4) months subsequent to the surgery. Dr. Montgomery noted that the claimant lacked full abduction, had limited internal rotation, as well as tenderness around the shoulder. Dr. Montgomery did not issue restrictions, as he felt the claimant was still recovering and would improve. Dr. Montgomery did not issue any rating on the left shoulder and does not recall if the claimant made any complaints, or if he looked at the left shoulder. The claimant was also examined by Dr. John Wertzberger, who the parties stipulated was qualified to render an opinion in this case. Dr. Wertzberger rated the claimant at fifteen percent (15%) permanent partial impairment to the body as a whole based on the right shoulder and three percent (3%) to the body as a whole based on the left shoulder for a total whole body rating of eighteen percent (18%). Dr. Wertzberger found that the claimant's left shoulder problems were medically consistent and compatible with the history of injury and the additional use of the left arm as related by the claimant. Dr. Wertzberger based his opinions on claimant's condition after he had reached maximum medical improvement. Dr. Wertzberger also placed restrictions of lifting in the light category of work and performing activities within zero to forty degrees (0-40°) abduction range for both shoulders.

Claimant was also evaluated by Michael J. Dreiling, vocational expert, who testified that, based on Dr. Montgomery's opinion that if claimant had no permanent restrictions, claimant would have no work disability. He further testified that if Dr. Wertzberger's restrictions were appropriate, claimant would be unable to perform fifty-eight percent (58%) of the jobs in the open labor market as compared to his pre-injury labor market. Mr. Dreiling also testified that after claimant's injury he would be limited to a maximum wage earning capacity of two hundred forty dollars (\$240.00) per week. Thereafter, Mr. Dreiling opined that claimant's loss of ability to earn comparable wages was thirty-four percent (34%).

The claimant has an eighth grade education and does not have a GED, nor does he have any vocational or technical training. Claimant's ability to read is at a second grade level, and claimant had repeated several grades in school. Claimant has been employed by IBP for twenty-four (24) years and continues to work for IBP at comparable wages. Claimant's job duties have been modified by IBP, and he has been restricted to performing only a portion of his pre-injury job. Given the severity of the injury involved in this case, which limits the claimant to light-duty restrictions with both shoulders and severe limitations on movement of the shoulders, the claimant's lack of transferable skills, his prior work history and the length of his employment at IBP, the Appeals Board finds that the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e(a) has been overcome, and the claimant is entitled to a work disability based on the facts of this case.

The Award by Special Administrative Law Judge William F. Morrissey incorrectly computed claimant's loss of ability to perform work in the open labor market. The uncontroverted evidence of Mr. Dreiling is that the claimant has a fifty-eight percent (58%) loss of ability to perform work in the open labor market. The claimant is earning comparable wages and, therefore, has zero percent (0%) loss in ability to earn comparable wages at the present time and, therefore, pursuant to Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board finds claimant has a twenty-nine percent (29%) permanent partial general work disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated October 11, 1994, is hereby modified, and an Award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Dick L. Poff, and against the respondent, IBP, Inc., self-insured, for an accidental injury sustained on October 19, 1991.

Based on an average weekly wage of \$362.94 claimant is entitled to 3 weeks of temporary total disability compensation at the rate of \$241.97 per week, in the sum of \$725.91, and 412 weeks of permanent partial general disability compensation at the rate of \$70.17 per week, in the sum of \$28,910.04, for a 29% permanent partial general work disability making a total award of \$29,635.95.

As of December 10, 1995, there is due and owing claimant 3 weeks of temporary total disability compensation at the rate of \$241.97 per week or \$725.91, followed by 213.14 weeks of permanent partial disability compensation at the rate of \$70.17 per week in the sum of \$14,956.03, for a total of \$15,681.94 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$13,954.01 is to be paid for 198.86 weeks at the rate of \$70.17 per week, until fully paid or further order of the Director.

Claimant is entitled to future medical treatment upon proper application to and approval by the Director and authorized medical expense of \$350.00 is ordered paid to or on behalf of the claimant.

The Kansas Workers Compensation Fund shall be responsible for payment of \$1,000.00 for the liability for the claim.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Biggs Reporting Service Transcript of Regular Hearing	\$251.50
Deposition of Michael Montgomery, M.D.	\$108.20
Curtis, Schloetzer, Hedberg, Foster & Associates Deposition of John J. Wertzberger, M.D.	\$274.25
Deposition of Michael J. Dreiling	\$159.45

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Steven M. Tilton, Topeka, Kansas
Pamela L. Falk, Emporia, Kansas
Michael G. Patton, Emporia, Kansas

William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director